JUN 26 1968
JOHN F. DAVIS, CLER

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 236

MICHAEL CONNOR,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Superior Court of the State of California for the County of Alameda, Appellate Department

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MICHAEL CONNOR,
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San Francisco, California 94112,
In Pro. Persona.

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Michael Connor prays that a writ of certiorari issue to review the judgment of the Superior Court of the State of California for the County of Alameda, Appellate Department, entered in the above-entitled case on March 20, 1968.

CITATION TO OPINIONS BELOW

No opinion of the Superior Court of the State of California for the County of Alameda was issued. The order of the Superior Court affirming the judgment of conviction was issued on March 20, 1968 and is unreported.

The order is printed in the appendix, *infra.*

JURISDICTION

The application and request for certification to the California Court of Appeal was denied on April 8, 1968 and is unreported. The denial is printed in the appendix, *infra.*

The jurisdiction of this court is invoked under 28 U.S.C. 1257(3) since rights, privileges and immunities are claimed under the Constitution, treaties and statutes of the United States.

QUESTIONS PRESENTED

(1) Is the war in Vietnam lawful?

(2) Does the lawfulness of the war in Vietnam on August 15, 1967 bear on the lawfulness of the business conducted at the Oakland Induction Center on August 15, 1967?

(3) Where I was sitting-in in the front of the doorway to the Oakland Induction Center, does my conviction for trespass deny my right to due process of law, where

(a) the trial court excluded any evidence on the legality of the war in Vietnam;

(b) an offer of proof was made in compliance with the Evidence Code, Section 354;

(c) the disputed fact in issue is the lawfulness of the business conducted at the Oakland Induction Center;

(d) the defense contended that the lawfulness of the war in Vietnam has a direct bearing on the lawfulness of the business conducted at the Oakland Induction Center.

(4) Did the trial court err in excluding evidence of the lawfulness of the U.S. action in Vietnam?

THE CONSTITUTIONAL PROVISIONS AND THE STATE STATUTE INVOLVED

Article I, Section 8, Clause 11 provides:

> The Congress shall have power to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;

Article II, Section 2, Clause 2 provides:

> He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur;

Article VI, Clause 2 provides:

> This Constitution, and the Laws of the U.S. which shall be made in pursuance thereof; and all

> treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Amendment XIV, Section 1 to the Constitution provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 602(j) of the California Penal Code provides:

> Every person who willfully commits any trespass by either: . . . (j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession; . . . is guilty of a misdemeanor.

STATEMENT OF THE CASE

Defendant and appellant was convicted of a violation of California Penal Code Section 602(j). This prosecution arose out of certain acts which occurred

on the morning of August 15, 1967. Specifically, defendant is accused of having committed an act of trespassing on the premises leased by the United States and known commonly as the Oakland Induction Center, at 15th and Clay Streets in Oakland. The appellant, a Social Worker in the City and County of San Francisco, joined a peaceful picket line in the vicinity of the Center in the early morning of August 15, 1967. After sometime on the picket line, the appellant joined others in "sitting in" in an alcove by a door into the Center. The demonstration continued peacefully, although some people walked over the demonstrators in order to get into the building. Thereafter, Section 602(j) was read to the demonstrators and they were told to leave. (Reporter's Transcript, pp. 56, 57.) This was a silent demonstration (Reporter's Transcript, p. 58) but the demonstrators, including appellant, were arrested, when they failed to leave after the order to do so.

At the trial, appellant, representing himself, testified in regard to his feelings and reasons for doing that he did in placing himself in the doorway of the Center. (Reporter's Transcript, pp. 58, 59), but was precluded from introducing evidence tending to establish the unlawfulness of the business being conducted by the United States on the premises above described. (Reporter's Transcript, pp. 41-47.)

In accordance with Section 354 of the Evidence Code, appellant made an offer of proof. These proceedings occurred in chambers, and were reported, commencing on page 41 of the Transcript. It appears

that appellant planned to have two experts testify in his behalf. The thrust of their evidence would go to establishing the illegality of the war then being fought in Vietnam by the United States. Appellant offered to prove that the business being conducted on the subject premises was not a lawful business in the meaning of Section 602(j). For a conviction under this act to be made, it must appear that the business being conducted thereon is lawful, and that there is an "intention of interfering with, obstructing, or injuring any lawful business of occupation carried on by the owner of such land, his agent or by the person in lawful . . ." (Penal Code, § 602(j).)

Appellant was further precluded from introducing certain documents on grounds of relevancy. (Reporter's Transcript, p. 51, l. 10.) On this basis, appellant was precluded from introducing the Charter of the United Nations, as well as documents pertaining to the principles developed through the trial of various war criminals at Nuremberg following World War II. The court did take judicial notice of the Selective Service Act of 1948 as well as the Army Regulation authorizing the conduct of the Induction Centers, such as the one in question, here.

At the conclusion of the evidence and arguments, the court instructed the jury "as a matter of law that the operation of the Induction Center on the premises of the Federal Building at 15th and Clay Streets in the City of Oakland is a lawful business, within the meaning of Section 602(j) of the Penal Code, and is not rendered unlawful or illegal because of any al-

leged illegality of United States intervention in Vietnam." (Reporter's Transcript, p. 81, ll. 13-19.)

Thereafter, the jury returned a verdict of guilty of violation of Section 602(j) of the Penal Code.

It was a violation of due process and thus prejudicial error to exclude evidence pertaining to the conduct of the war in Vietnam by the United States and in instructing the jury that the business conducted by the United States in the Induction Center was lawful.

It is respectfully submitted that the court committed prejudicial error in excluding the evidence pertaining to the legality of the position of the United States in Vietnam. The conduct of that war goes directly to the question of the lawfulness of the business conducted on the premises above described. If it is established that the war in Vietnam, or the position of the United States in that war violates the Constitution of the United States or International Law, the unlawfulness of the business of inducting men for the purpose of participating in that war would be established. It is submitted that the due process requires that appellant must have the opportunity of calling into question the legality of the position of the United States in Vietnam.

In 1946, Robert H. Jackson submitted his "Final Report to the President Concerning the Nuremberg War Crimes Trial", 29 Temple Law Quarterly 338. Justice Jackson had participated in the trial as chief prosecutor for the United States. It is worthwhile to quote some of the thoughts of this man who assisted in the prosecution of the Nazi war criminals.

> We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, is an international crime, and that for the commission of such crimes individuals are responsible. (p. 342)

Justice Jackson further stated:

> No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction. (Id.)
>
> . . . .
>
> Of course, it would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, just as it would be extravagant to claim that our federal laws make federal crime possible. But we cannot doubt that they strengthen the bulwarks of peace and tolerance. The four nations through their prosecutors and through their representatives on the Tribunal, have enunciated standards of conduct which bring new hope to men of good will and from which future statesmen will not lightly part. These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them. (Ibid. at 344)

Article 8 of the Charter annexed to the London Agreement of August, 1945 (which provided for the Nuremberg Trials), provides, basically, that an individual is not excused from prosecution under this agreement merely because he followed the orders of his government or of a superior.

Although the purpose of the Tribunal was to try Nazis after World War II, it is clear that the procedure and foundation of the Tribunal should be viewed as precedent. "These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them." 29 Temple Law Quarterly 342, at 344. The United States was one of the original four signatory powers to the London Agreement. It is also clear that one of the purposes of the Tribunal was to determine the legality of the war waged by the Germans. The legality of the war was to be determined by the standards of International Law.

In the within case, appellant offered to prove that the position of the United States in the war in Vietnam was not legal when judged by the standards of International Law as well as the Constitution of the United States. This offer was denied and it is contended by appellant that this was prejudicial to his cause. Had he been able to establish the illegality of the waging of the war by the United States, he would have been able to show that the business conducted by the United States in the Induction Center was not lawful. Any prosecution for violating Section 602(j) must necessarily fail if the business conducted on the

premises is not lawful. It is not sufficient merely to find that there is a business being conducted on the premises where the trespass is alleged to have occurred.

The people cited below the case of *United States v. Mitchell* (D.C., Conn.) 246 Fed. Supp. 874, for the proposition that the business conducted in the Induction Center is lawful. The court also relied on this case. (Reporter's Transcript, p. 44.) This case was subsequently reversed by the Circuit Court in 354 F.2d 767, for failure of the lower court to allow a continuance for the defendant to procure counsel. Defendant Mitchell was subsequently convicted of failing to report for induction. (369 F.2d 323.) The Supreme Court of the United States refused to hear the case, but Justice Douglas wrote a strong dissent, indicating that the Supreme Court should grant a hearing to determine the legality of the war. It is also interesting to note that in a preliminary hearing on dismissal of the indictment in the *Mitchell* case, the defendant was permitted to introduce evidence of the principles of Nuremberg and their applicability to his refusing induction. On appeal from the second trial, 369 F.2d 323, the court felt that it was not necessary to determine the legality of the war in Vietnam in order to determine the constitutionality of the Selective Service Act. It is submitted that if the war in Vietnam is in fact illegal, any procedures in furtherance of the war effort must also be found to be illegal. This would, *a fortiori,* include the conduct of the Selective Service System. It is obvious that con-

scription furthers the war effort, even though a particular person may not be called upon to fire a weapon.

In the instant case, the appellant attempted to show that the conduct of the war by the United States violated both the Constitution of the United States and International Law. Appellant was precluded from offering proof of such violations. The court held that the conduct of the war in Vietnam was not relevant to the conduct of the business of the Induction Center. (Reporter's Transcript, p. 45.) It is respectfully submitted that the number of United States troops in Vietnam is directly dependent on the total number of men in the Armed Forces of the United States. If this is conceded, it becomes obvious that conscription into the armed forces becomes a necessary adjunct of the conduct of that war. It then becomes obvious that the legality of the war, or of this country's conduct thereof, is directly related to the business of the Induction Center. To find that it is lawful to supply men to assist in the conduct of an unlawful war would be to divide that which is indivisible. It is of the utmost relevance that the legality of the conduct of the war in Vietnam be determined before deciding whether or not the business of drafting men to fight in that war is "lawful" within the meaning of Penal Code Section 602(j).

It is respectfully submitted that to exclude evidence on the conduct of the war by the United States in Vietnam is to commit reversible error in a trial for "entering any lands, . . . with the intention of inter-

fering with, obstructing, or injuring any lawful business or occupation. . . ." (Penal Code, Section 602(j).) The conduct of that war and the supplying of men for the armed forces are inextricably bound up together.

REASONS FOR GRANTING THE WRIT

I

THE WAR IN VIETNAM IS NOT LAWFUL.

By Article II of the Constitution, the President may make treaties. By Article VI, these treaties and the Constitution are the "Supreme Law of the Land."

The United Nations Charter is a presently effective treaty of the United States. (Title 2, U.S. Code, Section 287.) U.S. action in Vietnam is in violation of the U.N. Charter and also the Charter of the London Agreement of August, 1945.

Article I of the Constitution reserves the power to declare war to the Congress.

Congress has not declared war.

Therefore the United States is unlawfully at war in Vietnam.

II

THE UNLAWFUL WAR IN VIETNAM MAKES THE BUSINESS OF THE OAKLAND INDUCTION CENTER UNLAWFUL.

Since it would be impossible to fight the war in Vietnam without personnel to carry on the war, the operation of the Oakland Induction Center is an integral part of the operation of the Vietnam war.

The lawfulness of the Induction Center on August 15, 1967 thus cannot be separated from the question of the lawfulness of the war in Vietnam.

III

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE LAWFULNESS OF THE UNITED STATES ACTION IN VIETNAM AND PETITIONER WAS DENIED DUE PROCESS OF LAW.

The trial court erred in excluding evidence of the position of the United States in waging the war in Vietnam. It is submitted that such evidence was relevant in that it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code, Section 210.) It is further contended that this erroneous exclusion resulted in a denial of due process. The requirements of Section 354 of the Evidence Code were met, in making a proper offer of proof. The disputed fact in issue in the within case is the characterization of the business conducted on the premises at 15th and Clay Streets in the City of Oakland. It is respectfully submitted that appellant must be given an opportunity to attack any presumption or claim that the business conducted thereon was lawful.

For the foregoing reasons, it is respectfully submitted that reversible error has been made and that the trial court must be reversed on its ruling of exclusion of evidence pertaining to the position of the United States in its conduct of the war in Vietnam,

both under the Constitution of the United States as well as under International Law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
June 17, 1968.

Respectfully submitted,
MICHAEL CONNOR,
In Pro. Persona.

(Appendix Follows)

Appendix

In the Superior Court of the State of California
in and for the County of Alameda
Appellate Department

No. 270

The People of the State of California,
Plaintiff and Respondent,
vs.
Marcellus Michael Connor,
Defendant and Appellant.

REMITTITUR

The above entitled cause having been heretofore fully argued and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged And Decreed by the Court that the judgment on Appeal be and the same is hereby Affirmed: Request for Certification to the California District Court of Appeals is denied.

Quayle, P.J.
Emerson, J.
Dieden, J.

I, Jack G. Blue, Clerk of the Superior Court of the State of California in and for the County of Alameda,

do hereby certify that the foregoing is a true and correct copy of an original judgment entered in the above entitled action on the 20th day of March 1968 and now remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office this 8th day of April 1968.

Jack G. Blue, Clerk,
By B. J. Davis.

Filed April 8, 1968, Jack G. Blue, County Clerk, B. J. Davis, Deputy.